U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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DATE: SEP 27 2011 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting firm. It seeks to employ the beneficiary permanently in the United States as a product lifecycle management consultant pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089) approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of experience stated on the labor certification. Specifically, the director determined that the petitioner failed to demonstrate that the beneficiary possessed the foreign equivalent of a U.S. master's degree and five years of experience as required by the certified ETA Form 9089 prior to the priority date.

The record shows that the appeal is properly and timely filed, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

On appeal, counsel asserts that the beneficiary's education in France is equivalent to a U.S. master's degree based on three separate credential evaluations.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The beneficiary possesses a Diplôme d'Ingénieur from Centre d'Etudes Supérieures des Techniques Industrielles (CESTI) in France on November 17, 1998. The English translation of the diploma is an Engineering Diploma from the CESTI issued by Superior Studies Center of

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Industrial Techniques. Thus, the issues are whether that the Diplôme d'Ingénieur is a foreign degree equivalent to a U.S. master's degree or a U.S. baccalaureate degree.

Eligibility for the Classification Sought

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient United States workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[2] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a

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[2] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability"). In this case, the petitioner did not submit the beneficiary's transcripts from the educational institute where the beneficiary received his foreign equivalent degree. Therefore, the petitioner failed to submit an official academic record showing that the alien has a United States master's or bachelor's degree or a foreign equivalent degree.

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website at http://www.aacrao.org/index.aspx, "AACRAO is a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." http://www.aacrao.org/About-AACRAO.aspx (accessed July 28, 2011). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the home page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://aacraoedge.aacrao.org (accessed July 28, 2011). Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[3] If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.*

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[3] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx

EDGE confirms that while the *Diplôme d'Ingénieur* awarded upon completion of three years of post-secondary study in the second cycle program in engineering in France is not the foreign equivalent degree to a U.S. master's degree, it represents attainment of a level of education comparable to a bachelor's degree in the United States. In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). Here the beneficiary's *Diplôme d'Ingénieur* from France represents attainment of a level of education comparable to a U.S. bachelor's degree in engineering in the United States.

Counsel submits an educational evaluation prepared by [redacted] Corporation on November 4, 2008 (Trustforte) and two expert opinion letters from [redacted] dated November 5, 2008 (Appel) and [redacted] November 3, 2008 (Nemes) in support the Trustforte's evaluation. The Trustforte's evaluation report states that the beneficiary was awarded a master's level *Diplome d'Ingénieur* by the Superior Institute of Materials and Mechanical Construction upon completion of his three-year engineering program of the [redacted] following his completion of one year of requisite studies in a *Baccalauréat* program and two years of requisite studies in a *classe preparatoire* program. Thus, based on the six years of progressive undergraduate and graduate studies and the fact that the beneficiary surpassed the minimum year and credit requirements for a U.S. master's degree, the report concludes that the beneficiary attained the equivalent of a Master of Science Degree in Engineering from an accredited United States university.

The Trustforte evaluation and the expert opinion letters provide inconsistent conclusions with EDGE. EDGE confirms that all *Baccalauréat* programs represent attainment of a level of education comparable to completion of senior high school in the United States and completion of a *Classe Preparatoire aux Grandes Écoles (CPGE)* program represents attainment of a level of education comparable to two years of university study in the United States. The Trustforte's evaluation that considers the one year *Baccalauréat* program as a part of the beneficiary's undergraduate studies is misplaced. Although the two years of *CPGE* may represent two years of college studies, there is no evidence showing that the three-year *Diplome d'Ingénieur* program at the Superior Institute of Materials and Mechanical Construction is a master's degree level program or includes master's degree level education as a part of the program, nor is it clear that the program requires the equivalent of a U.S. bachelor's degree for entering the program. While the evaluator disputes EDGE's conclusion on this evaluation, she did not provide any documentary evidence to support her challenge to EDGE. In addition, USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[4]

[4] In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S.

USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Accordingly, in the instant case, the Trusteforte's evaluation and the supporting expert letters from Appel and Nemes are advisory statements. The petitioner failed to establish that the beneficiary possessed a U.S. master's degree or equivalent prior to the priority date.

Therefore, the beneficiary has a "United States baccalaureate degree or a foreign equivalent degree," and thus, meets the minimum level of education required for the equivalent of an advanced degree, namely a Bachelor's degree, for preference visa classification under section 203(b)(2) of the Act. However, to qualify for the second preference classification, the beneficiary must establish that he possessed at least five years of progressive experience in the specialty after his bachelor's equivalent degree but prior to the priority date.

In addition, the regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains two letters from the beneficiary's former employers concerning his employment history. The first letter is dated November 15, 2006, from [redacted] In this letter, [redacted] certifies that the beneficiary was employed by the company during the period November 2, 1998 to April 30, 2003 as a full-time application engineer. The other letter is dated October 24, 2006, written and signed by [redacted] America in California. Sunir Jain certifies that the beneficiary was employed by [redacted] during the period May 30, 2003 to June 5, 2006 as a full-time product lifecycle management consultant. Both letters include a specific description of the duties the beneficiary performed and verify that the experience with these two companies is progressive and was obtained post-bachelor's degree and prior to the priority date. The AAO finds that these two experience letters meet the requirements set forth at 8 C.F.R. § 204.5(g)(1), and therefore, the petitioner has established that the beneficiary possessed at least five years of progressive experience in the specialty after his bachelor's equivalent degree but prior to the priority date.

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bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

The beneficiary has a "United States baccalaureate degree or a foreign equivalent degree," and also has at least five years of progressive experience in the specialty, and thus, meets the minimum educational requirements for preference visa classification under section 203(b)(2) of the Act.

However, we must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu*, 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional

requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS' interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, lines 4 and 7, of the labor certification reflects that a master's degree in engineering or engineering related field is the minimum level of education required. Line 9 reflects that a foreign educational equivalent is acceptable. Line 8 reflects that no combination of education or experience is acceptable in the alternative. Lines 6 and 10 reflect that the proffered position also requires 60 months (five years) of experience in the job offered or in the related occupation as a software engineer or PLM consultant in addition to the educational requirements. The plain language of the labor certification clearly requires a master's degree in engineering or related field and five years of experience in the job offered or in related occupation for the proffered position. Line 14 reflects specific skills or other requirements, including experience with solution deployment for 3D design and Product Data Management in manufacturing, business process analysis in Automotive/Aerospace/Fabrication industry, utilizing CADCAM software (CATIA V5), Product Data Management software (ENOVIA LCA) and software development utilizing CNext (C++, COM Based), Visual Basic, and data modeling (UML).

The beneficiary set forth his credentials on the labor certification. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he has been working in the proffered position for the petitioner since June 5, 2006; prior to that, he worked as a product lifecycle management consultant for [redacted] from May 1, 2003 to June 5, 2006 and as an application engineer for [redacted] from November 2, 1998 to April 30, 2003. He does not provide any additional information concerning his employment background on that form.

The record of proceeding also contains a Form G-325, Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form under a section eliciting information about the beneficiary's employment last five years, he represented the same employment history as what he represented on the labor certification above a warning for knowingly and willfully falsifying or concealing a material fact.

While the beneficiary presents his eight years and eight months of experience in the job offered or related occupation prior to the priority date, at least five years of the experience would be applied towards establishing that the beneficiary meets the minimum educational requirements of the proffered position. Thus, the beneficiary does not possess five years of experience in the job offered or related occupation which also meets the special skills or other requirements set forth

in Line 14. Therefore, the beneficiary does not meet the job requirements on the labor certification.

In addition, as previously discussed, the record contains two letters from the beneficiary's former employers concerning his employment history. Although these two letters together establish the beneficiary's seven years and six months of qualifying experience, including the five years of progressive experience in his specialty after his foreign bachelor equivalent degree but prior to the priority date, they failed to establish that the beneficiary possessed another two years and six months of experience in the job offered or related occupation which also meets the specific requirements set forth in line 14 of the labor certification. The record does not contain any other regulatory-prescribed evidence concerning the beneficiary's qualifying experience for the proffered position. Therefore, the petitioner failed to establish that the beneficiary possessed five years of experience in the job offered or related occupation in addition to the five years of progressive experience in the specialty prior to the priority date, and thus, the beneficiary does not meet the job requirements on the labor certification. For the reason mentioned above, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.